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8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
10 AT TACOMA

11 MARY ANN NYE-RICHARDSON,

12 Plaintiff,

13 v.

14 MICHAEL J. ASTRUE, Commissioner of  
15 Social Security Administration,

16 Defendant.

CASE NO. C08-5598RJB

REPORT AND  
RECOMMENDATION

Noted for June 12, 2009

17  
18 This matter has been referred to Magistrate Judge J. Richard Creatura pursuant to 28  
19 U.S.C. § 636(b)(1)(B) and Local Magistrates Rule MJR 4(a)(4) and as authorized by Mathews,  
20 secretary of H.E.W. v. Weber, 423 U.S. 261 (1976). Plaintiff brings this action pursuant to 42  
21 U.S.C. § 405(g) seeking judicial review of a final decision of the Commissioner of Social  
22 Security denying her application for disability benefits under Title II of the Social Security Act,  
23 42 U.S.C. §§ 401-33. This matter has been briefed, oral argument was heard on May 19, 2009,  
24 and after reviewing the record, the undersigned recommends that the Court remand the matter to  
25 the administration for further consideration.  
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## INTRODUCTION AND PROCEDURAL HISTORY

Plaintiff, Mary Ann Nye-Richardson, was born in 1956. She attended college for three years, and she has worked in the past as a registered nurse and nurse supervisor (Tr. 34, 99).

Plaintiff alleges that her disability began in March 2002 (Tr. 84). In April 2007 Dr. Meagher evaluated Plaintiff's mental health. He concisely summarized Plaintiff's medical history as follows:

Ms. Richardson reported that her ongoing difficulties with cervical, lumbar, extremity and headache pain as well as subsequent depressive symptoms resulted from two work related injuries the first of which occurred in January of 1994. Ms. Richardson was working as a nurse at a hospital ICU ward when she had occasion to be grabbed around the neck by a 500 pound patient who was evidently quite agitated. Ms. Richardson extricated herself and crawled away with notable pain in the upper aspect of her spine. She sought some conservative treatment and continued working as pain symptoms persisted. Eventual neurodiagnostic evaluation indicated a cervical disc herniation which was treated with a fusion from which the patient recovered quite effectively. She was able to go back to a lighter duty nursing job within 6 weeks of the surgery, and eventually she returned to hospital floor nursing. Unfortunately within that work context, she had occasion to have another industrial injury involving lifting a patient which resulted in compromising her cervical fusion as well as resulting in lumbar strain and a compression fracture in November of 2001. Ms. Richardson again tried to continue working and did so for nearly 3 months before escalating pain symptoms precluded normal functioning. Further evaluation indicated that the fusion had failed from the second injury and another surgery ensued which added hardware in early 2003. Her recovery from that procedure has been marginal in spite of considerable conservative treatment, and she has not been able to return to any productive functioning. She has also become quite reliant on multiple medications including opiate analgesics, and this has become a concern to both her providers and herself. As you probably know, treatment included a trial at a multidisciplinary pain clinic last year but that evidently failed after one week due to its focus on work hardening. A more recent IME evidently suggested a need for some further behavioral treatment measures especially in the context of depressive symptoms. That recommendation along with your concern regarding her medication dependency has prompted the present evaluation.

Ongoing pain symptoms include the cervical and lumbar region, periodic paresthesia in all limbs, and occipital headache that occurs on a near daily basis. Pain symptoms are aggravated by most any activity as well as being in any one position too long. Current treatment is limited to the medications and there was the last in a series of epidural injections some 2 weeks ago. The patient also tries

1 to cope with the pain on her own through distraction, relaxation, hot showers,  
2 rocking, or crying.

3 Tr. 608-609.

4 Plaintiff filed her application for disability benefits on January 3, 2003, and as noted  
5 above alleged disability since March 2002, specifically March 19, 2002. Ms. Richardson claims  
6 her “neck and back injury requires medication for pain, muscle relaxers and rest, subsequent  
7 nausea vomiting issues, surgery needed.” Tr. 98. Plaintiff’s applications were denied at the  
8 initial administrative levels. On January 13, 2006, an administrative hearing took place in  
9 Olympia, Washington before an administrative law judge (“ALJ”). The ALJ heard testimony  
10 from Plaintiff, Dr. Douglas Smith (a medical expert), and Paul Prachyl (a vocational expert). Tr.  
11 617-82.  
12

13 On September 29, 2006, the ALJ issued a partially favorable decision applying the five-  
14 step sequential evaluation process. Tr. 27-36. 20 C.F.R. §§ 404.1520. The ALJ determined that  
15 Plaintiff was disabled and entitled to benefits from March 2002 through February 1, 2004. Tr.  
16 33. However, the ALJ also found that after February 1, 2004, Plaintiff retained the residual  
17 functional capacity to perform sedentary work and some light work. *Id.* Specifically, the ALJ  
18 found the record showed significant medical improvement and relying upon vocational expert  
19 testimony, the ALJ found that an individual with Plaintiff’s age, education, work history, and  
20 residual functional capacity could perform jobs existing in significant numbers in the national  
21 economy, such as an office helper, telephone solicitor, and microfilm document preparer. Tr. 34,  
22 679-80.  
23

24 Plaintiff alleges the ALJ erred in not finding her entitled to benefits beyond February  
25 2004. In her Opening Brief, Plaintiff argues the ALJ made the following errors:  
26

1 (1) at step-two the ALJ failed to find Plaintiff's diagnosed depression was a "severe"  
2 impairment;

3 (2) the ALJ failed to find any mental or physical functional limitations despite finding  
4 Plaintiff suffered from a chronic pain syndrome impairment at step-two;

5 (3) the ALJ failed to properly assess Plaintiff's residual functional capacity;

6 (4) the ALJ failed to properly assess and consider the opinions and reports from Dr.  
7 Phillips and Dr. Kaffl; and  
8

9 (5) the ALJ failed to properly consider the lay witness evidence.

10 In her Reply Brief, Plaintiff focuses the court's attention to only three issues (the ALJ's step-five  
11 analysis, the ALJ's consideration of the medical evidence related to Plaintiff's mental  
12 impairments, and the ALJ's consideration of the lay witness testimony). Defendant opposes  
13 Plaintiff's allegations, and asserts that the denial of Plaintiff's application for benefits is properly  
14 supported by substantial evidence and free of any legal error. Defendant asks the court to affirm  
15 the administrative decision.  
16

17 Significantly, at oral argument, Defendant conceded the ALJ failed to review all of the  
18 relevant medical evidence. Defendant further agreed that the matter should be remanded for  
19 further proceedings, but not for an outright award of social security benefits as argued by  
20 Plaintiff. After reviewing the matter, the Court recommends that the District Court should  
21 remand the matter to the administration for further consideration.  
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### 23 STANDARD OF REVIEW

24 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of  
25 social security benefits when the ALJ's findings are based on legal error or not supported by  
26 substantial evidence in the record as a whole. Bayliss v. Barnhart, 427 F.3d 1211, 1214 (9th Cir.

2005). “Substantial evidence” is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 201 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir.1989).

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.1995). While the Court is required to examine the record as a whole, it may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.2002). When the evidence is susceptible to more than one rational interpretation, it is the Commissioner's conclusion that must be upheld. *Id.*

Plaintiff bears the burden of proving that he or she is disabled within the meaning of the Social Security Act (the “Act”). *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.1999) (*internal citations omitted*). The Act defines disability as the “inability to engage in any substantial gainful activity” due to a physical or mental impairment which has lasted, or is expected to last, for a continuous period of not less than twelve months. 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). Plaintiff is disabled under the Act only if his or her impairments are of such severity that he or she is unable to do her previous work, and cannot, considering her age, education, and work experience, engage in any other substantial gainful activity existing in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B); *Tackett v. Apfel*, 180 F.3d 1094, 1098-99 (9th Cir. 1999).

## **DISCUSSION**

### ***A. The ALJ Failed To Properly Evaluate Plaintiff's "Severe" Impairments And The Medical Evidence***

The ALJ failed to properly consider the medical evidence and consequently, Plaintiff's residual functional capacity is not supported by substantial evidence. Specifically, the undersigned accepts Respondent's concession at oral argument, and the court finds the ALJ erred when he failed to properly consider the opinions of Dr. Kaffl and Dr. Phillips.

In addition, the court finds the ALJ erred in his evaluation of Plaintiff's mental impairments. The ALJ's decision is internally inconsistent. For instance, at step two, the ALJ found Plaintiff did not have any "severe" mental health impairment. Tr. 30-31. However, in the context of finding Plaintiff retained the ability to do certain type of work, the ALJ found Plaintiff suffered from chronic pain syndrome. Tr. 35. Furthermore, the ALJ noted Plaintiff's nonexertional or mental limitations, finding that these limitations diminished her ability to perform a full range of sedentary work. Tr. 34.

Step-two of the administration's evaluation process requires the ALJ to determine whether an impairment is severe or not severe. 20 C.F.R. §§ 404.1520, 416.920 (1996). The step-two determination of whether a disability is severe is merely a threshold determination of whether the claimant is able to perform his past work. Hoopai v. Astrue, 499 F.3d 1071, 1076 (9<sup>th</sup> Cir. 2007). A finding that a claimant is severe at step-two only raises a prima facie case of a disability. Id. See also Tackett v. Apfel, 180 F.3d 1094, 1100 (9th Cir.1999).

An impairment is "not severe" if it does not "significantly limit" the ability to do basic work activities. 20 C.F.R. §§ 404.1521(a), 416.921(a). The Social Security Regulations and Rulings, as well as case law applying them, discuss the step-two severity determination in terms of what is "not severe." According to the Commissioner's regulations, "an impairment is not

1 severe if it does not significantly limit [the claimant's] physical ability to do basic work  
2 activities." 20 C.F.R. §§ 404.1520(c), 404.1521(a)(1991). Basic work activities are "abilities  
3 and aptitudes necessary to do most jobs, including, for example, walking, standing, sitting,  
4 lifting, pushing, pulling, reaching, carrying or handling." 20 C.F.R. § 140.1521(b); Social  
5 Security Ruling 85- 28 ("SSR 85-28"). An impairment or combination of impairments can be  
6 found "not severe" only if the evidence establishes a slight abnormality that has "no more than a  
7 minimal effect on an individual's ability to work." Yuckert v. Bowen, 841 F.2d 303, 306 (9th  
8 Cir.1988)(adopting SSR 85-28).

10 As noted above, it is unclear whether the ALJ found a mental impairment at step-two. It  
11 is unclear whether or not the ALJ considered Plaintiff's chronic pain disorder a severe  
12 impairment at step-two. The Social Security Regulations set forth a specific procedure for  
13 evaluating mental impairments. First, the ALJ must determine whether a mental impairment  
14 exists by carefully reviewing the evidence. 20 C.F.R. § 404.1508, 404.1528, 20 C.F.R. Pt. 404,  
15 Subpt. P., App. 1, 12.00B. Once it is determined that a mental impairment exists, the ALJ must  
16 rate the degree of functional limitation resulting from the impairment. 20 C.F.R. §  
17 404.1520a(b)(2). In Gutierrez v. Apfel, 199 F.3d 1048, 1051 (9th Cir. 2000), the Ninth Circuit  
18 held that an ALJ's failure to properly evaluate the severity of the claimant's alleged mental  
19 impairment under 20 C.F.R. § 404.1520a, requires reversal where the claimant has a "colorable  
20 claim of a mental impairment." Id. The regulations require the ALJ to include specific findings  
21 as to the degree of limitation in activities of daily living, social functioning, concentration,  
22 persistence or pace, and episodes of decompensation: "when we evaluate the severity of mental  
23 impairment for adults . . . we must follow a special technique at each level in the administrative  
24 review process." 20 C.F.R. § 404.1520a(a) (emphasis added). The regulations require that the  
25  
26

1 ALJ rate the degree of functional limitation in the four areas described above. 20 C.F.R. §  
2 416.920a(c).

3 After reviewing the record, this court finds the ALJ failed to properly consider the  
4 medical evidence. Respondent conceded this error at oral argument. As noted above, the ALJ  
5 found nonexertional limitations presumably related to her chronic pain syndrome. Although the  
6 ALJ found that these nonexertional limitations did not significantly erode the number of  
7 available sedentary jobs; it is impossible to assess the legitimacy of the ALJ's decision because  
8 he has failed to include a specific finding as to the degree of limitation in each of the four  
9 functional areas.  
10

11 Also problematic is the fact that the ALJ has not discussed the chronology of the mental  
12 impairments. For example, the ALJ states his that assessment of Plaintiff's mental health and  
13 conclusion that she does not suffer from any severe impairment is supported by state agency  
14 medical consultants with Disability Determination Services (DDS). Tr. 31. The problem is the  
15 DDS evaluation was performed in July of 2005. The ALJ does not specifically assess Plaintiff's  
16 mental health in the context of his finding of disability before February 1, 2004, or after that  
17 period. Evidence in the record, including the evaluations of Drs. Werschkul, Phillips, and  
18 Meagher, appears to support the contention that Plaintiff's mental health has progressively  
19 worsened over time. The court notes several opinions were produced or incorporated into the  
20 administrative record after the administrative hearing or the ALJ's decision, and thus, the ALJ  
21 did not have an opportunity to consider the evidence when his decision was made. Remand to  
22 the administration is appropriate for consideration of these records, in addition to any further  
23 evidence that is relevant to Plaintiff's claim of disability.  
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1 In sum, the ALJ's failure to properly address the opinions of Drs. Kaffl and Phillips, the  
2 ALJ's inconsistent decision with regard to Plaintiff's mental or nonexertional limitations, and  
3 the ALJ's failure to specifically assess the degree of limitation in activities of daily living, social  
4 functioning, concentration, persistence or pace, and episodes of decompensation, related to  
5 Plaintiff's mental impairments, requires the court to remand the matter to the administration to  
6 reconsider the medical evidence.  
7

8 ***B. The ALJ Failed To Meet His Burden***

9 Plaintiff argues the ALJ did not meet his burden of production at step-five by citation to  
10 the medical-vocational guidelines or by citation to the specific jobs of microfilm document  
11 preparer; office helper and telephone solicitor. This argument is first based on the argument that  
12 the ALJ failed to properly assess Plaintiff's residual functional capacity.  
13

14 The Social Security Regulations establish a five-step sequential evaluation process for  
15 determining whether a claimant is disabled. *See* 20 C.F.R. § 404.1520. Once the claimant  
16 establishes a prima facie case, the burden of proof shifts to the agency at step five to demonstrate  
17 that "the claimant can perform a significant number of other jobs in the national economy."  
18 Thomas v. Barnhart, 278 F.3d 947, 955 (9th Cir.2002). This step-five determination is made on  
19 the basis of four factors: the claimant's residual functional capacity, age, work experience and  
20 education. To assist in the step-five determination, the Social Security Administration  
21 established the Medical-Vocational Guidelines (the grids), which "consist of a matrix of [the four  
22 factors] and set forth rules that identify whether jobs requiring a specific combination of these  
23 factors exist in significant numbers in the national economy." Heckler v. Campbell, 461 U.S.  
24 458, 461-62 (1983). When the grids match the claimant's qualifications, "the guidelines direct a  
25 conclusion as to whether work exists that the claimant could perform." Id. at 462. When the grids  
26

1 do not match the claimant's qualifications, the ALJ can either (1) use the grids as a framework  
2 and make a determination of what work exists that the claimant can perform, *see* Soc. Sec.  
3 Ruling 83-14, or (2) rely on a vocational expert when the claimant has significant non-exertional  
4 limitations. Desrosiers v. Sec'y of Health and Human Servs., 846 F.2d 573, 577 (9th Cir.1988).

5       Because the ALJ in this matter found Plaintiff disabled, but also found the medical  
6 condition had improved to the point that the ALJ concluded Plaintiff was not disabled since  
7 February 2004, the court will note that the medical improvement standard requires the  
8 government, in all relevant respects, to prove that the claimant is no longer disabled. Waters v.  
9 Barnhart, 276 F.3d 716, 718 (5th Cir. 2002), *citing* 42 U.S.C. § 423(f); Griego v. Sullivan, 940  
10 F.2d 942, 943-44 (5th Cir. 1991). The Fifth Circuit further explained that the “medical  
11 improvement” standard is not limited to only termination cases – where the government is  
12 seeking to halt the ongoing payment of benefits. Id. at 719.

13       After finding disability, the burden was on the ALJ to prove Plaintiff was no longer  
14 disabled beyond February 2004. The ALJ found that after February 1, 2004, Plaintiff retained  
15 the residual functional capacity to perform sedentary work and some light work. Tr. 33. The  
16 ALJ concluded Plaintiff was a “younger individual age 45-49.” Tr. 34, 36. The ALJ noted  
17 Plaintiff’s nonexertional or mental limitations, but nonetheless stated Rule 201.21 of the grids  
18 would dictate a finding of non-disability. The ALJ found application of Rule 201.21 consistent  
19 with the conclusions of the vocational expert, who at the hearing testified that a hypothetical  
20 individual as posed by the ALJ would be capable of workings as a microfilm document preparer,  
21 office helper, or telephone solicitor. *Id.*

1 After reviewing the matter, the undersigned finds the ALJ failed to meet the burden of  
2 proving either Plaintiff retained the ability to perform certain jobs post February 1, 2004, or  
3 Plaintiff's medical condition had significantly improved as of February 1, 2004.

4 The ALJ's findings are based on his assessment of Plaintiff's residual functional  
5 capacity, which (as discussed above) may have failed to properly take into account Plaintiff's  
6 mental impairments.

7  
8 There is also an argument that the ALJ offered inconsistent assessments and the court  
9 should remand the matter to resolve the dispute. Specifically, in his narrative discussion of the  
10 evidence, the ALJ found that Plaintiff could: lift up to 10 pounds occasionally and less than 10  
11 pounds frequently; sit up to six hours per day; and stand and/or walk intermittently up to six  
12 hours per day; occasionally climb ramps or stairs, but never any ladders, ropes, or scaffolds; and  
13 occasionally balance, stoop, kneel, crouch, and crawl. *Id.* In contrast, the ALJ's findings state  
14 Plaintiff retained the ability to stand and/or walk for only four hours in an eight-hour workday.  
15 Tr. 35. It clearly appears the ALJ intended to adopt the latter finding, because his hypothetical  
16 question posed to the vocational expert asked him to assume an individual with the following:  
17 "Lift and carry 10/less than 10, stand and walk four out of eight, sit six out of eight, occasional  
18 stairs, no ropes, ladders or scaffolds, occasional balance, stoop, kneel, crouch, crawl, no heights  
19 or hazards." (Tr. 680). While Plaintiff challenges the ALJ's assessment of her residual  
20 functional capacity (discussed further below) and decision on other bases, she concedes the  
21 ALJ's residual functional capacity assessment including her ability to walk for only four hours in  
22 an eight-hour workday is consistent with an ability to perform the full range of sedentary work.  
23 Plaintiff's Reply Brief at 3.  
24  
25  
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1 The matter does not need to be remanded to resolve the inconsistency between the ALJ's  
2 narrative discussion of Plaintiff's residual functional capacity and his specific findings related to  
3 Plaintiff's ability to stand or walk during an eight-hour workday. However, the issue should be  
4 reviewed and the matter should be remanded to allow the administration the opportunity to  
5 reconsider Plaintiff's residual functional capacity in light of the court's finding that the ALJ  
6 failed to properly evaluate the medical evidence regarding Plaintiff's mental and physical  
7 impairments, as discussed above.  
8

9 On remand the administration should reevaluate the ALJ's use and reliance on Rule  
10 201.21. Rule 201.21 applies to a younger individual age 45-49, a high school graduate or more,  
11 with skilled or semiskilled previous work experience, but no transferable skills. 20 C.F.R. pt.  
12 404, subpt. P., app. 2 § 201.21. On the date of the ALJ's decision, September 29, 2006, Ms.  
13 Richardson was one month shy of her 50th birthday. In such a situation, the ALJ should have  
14 considered whether because of her borderline age, Mrs. Richardson was disabled.  
15

16 The Commissioner has indicated that he will:

17 not apply the age categories mechanically in a borderline situation. If you are  
18 within a few days to a few months of reaching an older age category, and using  
19 the older age category would result in a determination or decision that you are  
20 disabled, we will consider whether to use the older age category after evaluating  
21 the overall impact of all the factors in your case.

22 20 C.F.R. § 404.1563(b). In Russell v. Bowen, 856 F.2d 81, 84 (9th Cir.1988), the Ninth Circuit  
23 recognized that the age categories should not be applied mechanically in a borderline situation,  
24 but found that Russell's case was not a borderline case because he was closer to age 59 to age 60  
(59 years and 5 months old).

25 Finally, the court finds little discussion in the ALJ's opinion related to the significance of  
26 February 1, 2004 as the date of termination of Plaintiff's disability and point of medical

1 improvement. Plaintiff's revision of her neck fusion surgery occurred on August 6, 2003, and  
2 the ALJ noted the medical expert testified, "that the claimant's neck would have healed within 6  
3 months of the second surgery," (Tr. 29) which would chronologically indicate Plaintiff would  
4 have recovered from her surgery in February 2004. The ALJ also twice noted a cervical  
5 fluoroscopy report dated February 12, 2004, (Tr. 29, 33) to support his finding of medical  
6 improvement in February 2004. However, a review of this report does not significantly support  
7 the ALJ's finding. Dr. Dhanda found no evidence of a fracture, but also stated the study was  
8 similar to a study from August 12, 2003. Tr. 310. As discussed above the ALJ failed to  
9 properly consider the medical evidence related to Plaintiff's mental health. The ALJ also failed  
10 to properly assess the lay witness evidence (discussed below). The medical evidence related to  
11 Plaintiff's mental health and the lay witness statements supports Plaintiff's contention that she  
12 suffered from significant limitations after February 2004.  
13

14  
15 In sum, the ALJ has not meet his burden of showing Plaintiff's medical condition  
16 improved to the point that after February 1, 2004, she retained the ability to perform those jobs  
17 identified by the vocational expert. The ALJ failed to properly assess the medical evidence  
18 related to Plaintiff's mental health and consequently, the ALJ's residual functional capacity  
19 assessment was flawed. On remand the ALJ should reconsider step-five and if any finding of a  
20 date on which Plaintiff is found no longer disabled due to medical improvement, the ALJ should  
21 cite to specific evidence to support that finding.  
22

23 ***C. The ALJ Failed To Properly Consider Lay Testimony Provided By Ms. Gullan***

24 The ALJ has a special duty to fully and fairly develop the record and to assure that the  
25 claimant's interests are considered. Brown v. Heckler, 713 F.2d 441, 443 (9th Cir. 1983). "In  
26 determining whether a claimant is disabled, an ALJ must consider lay witness testimony

1 concerning a claimant's ability to work.” Stout v. Comm'r, 454 F.3d 1050, 1053 (9th Cir. 2006).  
2 Lay testimony as to a claimant's symptoms is competent evidence that an ALJ must take into  
3 account, unless he or she expressly determines to disregard such testimony and gives reasons  
4 germane to each witness for doing so. Bruce v. Astrue, 557 F.3d 1113, 1115(9<sup>th</sup> Cir. 2009);  
5 Nguyen v. Chater, 100 F.3d 1462, 1467 (9th Cir.1996) (*citing* Dodrill v. Shalala, 12 F.3d 915,  
6 918-19 (9th Cir.1993)).

7  
8 In August 2005, Margaret Gullan, a volunteer with Sacred Heart Emergency Outreach,  
9 submitted a declaration regarding Plaintiff’s observed limitations. Tr. 144-45. Ms. Gullan,  
10 prefaced her declaration, stating, “During the past two years I have seen Mary Ann Nye-  
11 Richardson at least once a week and sometimes two or three times a week for at least a couple of  
12 hours each time.” Tr. 144. Ms. Gullan stated that Plaintiff is in constant pain, unable to drive  
13 due to the side effects of her pain medications (Oxycontin and Vicodin), and the medications  
14 affect her ability to concentrate and stay focused in conversations. Tr. 144.

15  
16 The ALJ addressed Ms. Gullan’s statement, stating the following:

17 Before discussing the credibility of the claimant’s statements, I first turn to the  
18 statement of the claimant’s friend, Margaret Gullan, who reported in August of  
19 2005 that the claimant was in constant pain, from what she had observed. She  
20 reported that the claimant had difficulty both sitting and being on her feet. Ms.  
21 Gullan opined that the claimant would not be able to do any kind of work for 8  
22 hours per day because of her pain, the side effects of her medications, and her  
23 inability to sustain motions. Ex 11E/1.

24 I have considered this opinion and agree that the claimant must limit her  
25 activities. This is reflected in my assessment of her residual functional capacity.  
26 And I agree that the evidence shows that, before February 1, 2004, the claimant  
was unable to sustain a full and competitive work schedule on a regular and  
continuing basis. I have given weight to this witness statement and have assessed  
a restrictive residual functional capacity, even after the date the claimant’s  
disability ended, as discussed below. *But I do not find that the evidence  
establishes that the claimant has been unable to work since recovering from her  
second fusion, as discussed more thoroughly below.*

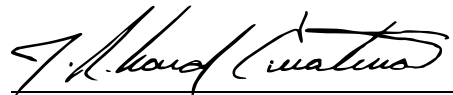
Tr. 32 (italics added).

1 First, it appears from the above italicized comment that the ALJ may have erred and  
2 placed the burden on Plaintiff to prove she has been unable to work since recovering from her  
3 second surgery. As previously discussed, once the ALJ found Plaintiff was disabled and entitled  
4 to benefits prior to February 2004, the burden was on the ALJ to prove Plaintiff's condition had  
5 improved to the point that she was no longer disabled. With regard to Ms. Gullan's statements  
6 and observations, Plaintiff argues the reasons the ALJ gave in general for determining Ms.  
7 Richardson was not disabled after February 2004 are not sufficient to reject or limit Ms. Gullan's  
8 testimony to pre-February 2004. The undersigned agrees. The ALJ should reconsider the lay  
9 testimony after reconsidering the medical evidence.  
10

11 CONCLUSION

12 Based on the foregoing discussion, the Court should remand the matter to the  
13 administration for further consideration. Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of  
14 the Federal rules of Civil Procedure, the parties shall have ten (10) days from service of this  
15 Report to file written objections. *See also* Fed. R. Civ. P. 6. Failure to file objections will result  
16 in a waiver of those objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140 (1985).  
17 Accommodating the time limit imposed by Rule 72(b), the clerk is directed to set the matter for  
18 consideration on **June 12, 2009**, as noted in the caption.  
19

20 DATED at this 20<sup>th</sup> day of May, 2009.

21  
22 

23 J. Richard Creatura  
24 United States Magistrate Judge  
25  
26